United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1360

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P/S

To be argued by
JOHN A. LOWE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1360

UNITED STATES OF AMERICA,
Appellee,

—v.—

THOMAS ZAMMAS,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Thomas Zammas appeals from a judgment of conviction entered on September 29, 1975, in the United States District Court for the Southern District of New York, after a two week trial before the Honorable Constance Baker Motley, United States District Judge, and a jury.

Indictment 74 Cr. 987, filed October 24, 1974, charged the defendant Zammas and two others with six counts of causing the use of the mails in furtherance of a scheme to defraud the subscribers and readers of *Value Line Selection & Opinion* in violation of Title 18, United States Code, Sections 1341 and 2, and with six counts of causing the use of the mails to publish an article describing a security without fully disclosing a $15,000 bribe paid for the article in violation of Title 15, United

States Code, Sections 77q(b) and 77x and Title 18, United States Code, Section 2.

Trial commenced on July 28, 1975 and ended on August 7, 1975 when the jury found Zammas guilty of all twelve counts of the indictment.*

On September 29, 1975, Judge Motley sentenced Zammas to concurrent terms of 18 months, imprisonment on each count. The defendant is at liberty pending this appeal.

Statement of Facts

The Government's Case

From the Spring to the Fall of 1972, Zammas was a private securities dealer who, together with his co-defendant, William Rodman, a trader and registered representative at C. I. Oren & Company, was promoting the sale to the public of the common stock of Power Conversion, Inc. (Power Conversion) (A. 102a-03a, 214a, 218a, 475a-76a, 687a-90a, 842a-48a; GX 2A, 2B, 3A, 3B, 16, 16A).** The common stock of Power Conversion was publicly traded on the over-the-counter market.

During 1972, co-defendant William Eric Aiken was the executive editor of *Value Line Selection & Opinion* (hereinafter referred to as "*Selection & Opinion*"), an investment advisory service published by Arnold Bernhard & Co. as part of the *Value Line Investment Survey*

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* On July 28, 1975, the co-defendant William Eric Aiken entered a plea of guilty to one count of the indictment; the co-defendant William Rodman was acquitted.

** References to appellant's appendix are in the form "A—"; to defense exhibits in the form "DX —"; to Government Exhibits in the form "GX —"; and to appellant's brief in the form "App. Br. —."

(A. 195a-96a). As the executive editor, Aiken had virtually absolute control over what was published, subject occasionally to his employer's desire to have a particular item published (A. 294a-97a).

In either the Spring of 1972 or in September of that year,* defendant Zammas approached Stanley Perlmutter, an associate of Aiken (A. 198a), to inquire whether Aiken would publish an article about Power Conversion in *Selection & Opinion* in return for a bribe from Zammas (A. 91a, 94a). Perlmutter relayed Zammas' message to Aiken who initially refused to do business with Zammas because Aiken still had not been paid the full amount of the bribe he was promised by Zammas for an article about Casa Bella Imports, Inc., published in *Selection & Opinion* in the Fall of 1970 at Zammas' urging. That article, like others for which Aiken had received bribes, was published without disclosing the bribe (A. 97a, 199a, 211a-12a; GX 1A).

After the initial refusal, Perlmutter told Aiken there would be guarantees of payment (A. 278a), and Aiken finally agreed to meet with Zammas (A. 99a, 211a). In late August or early September, 1972, Zammas, Aiken and Perlmutter met for dinner at the LaFortuna Restaurant on 41st Street in Manhattan (A. 99a, 212a-13a). After some small talk and some discussion concerning what had gone wrong with the Casa Bella Imports deal, Zammas offered Aiken a bribe consisting of $15,000 in cash and an option on 20,000 shares of Power Conversion stock in return for Aiken publishing an article about Power Conversion in *Selection & Opinion.* When

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* Perlmutter testified that he first spoke to Zammas and Aiken about the Power Conversion article in the Spring (A. 91a). Aiken testified that Perlmutter first spoke to him about the Power Conversion article in September (A. 199a).

Aiken asked for a guarantee of payment, Zammas offered Aiken $1,000 cash in advance and 1,000 shares of Power Conversion stock to be held as security. Aiken then told Zammas that they had a deal (A. 100a, 213a-17a).

After dinner, Perlmutter left, and Zammas and Aiken then took a cab to Zammas' apartment at 35th Street and Lexington Avenue (A. 101a, 218a). At the apartment, Zammas introduced Aiken to Henry Goldfarb, a broker who, Zammas said, was "doing a job in Power Conversion, too" (A. 218a). Zammas left the room for a few minutes and then called Aiken into the kitchen. Goldfarb remained in the living room while Aiken went into the kitchen. There Zammas gave Aiken $1,000 in cash and three stock certificates representing 900 shares of Power Conversion stock (A. 218a-19a; GX 1B). Aiken then left the apartment and went to the No-Name Bar in Greenwich Village where he loaned $500 in cash to Dan Lettieri, the owner of the bar (A. 219a, 834a-36a; GX 6A).

While Aiken was preparing the article about Power Conversion for publication (A. 305a, 345a-50a), Zammas had several conversations with Rodman about the forthcoming article, and, on one occasion, in Zammas' presence, Rodman produced $5,000 in cash to be used as part of the payoff to Aiken (A. 478a-82a).

On or about September 18, 1972, Zammas met with Leonard Flocco, the manager of a branch of the First National City Bank, 2 Broadway, Manhattan, to arrange a series of personal loans secured by pledges of Power Conversion stock. In order to persuade Flocco to make the loans, Zammas told him about the merits of the company and that an article about Power Conversion would soon appear in *Selection & Opinion* (A. 867a; GX 18).

During the week ending September 29, 1972, Arnold Bernhard & Co. mailed out to its subscribers 42,955 copies of that week's issue containing the Power Conversion article (GX 1E). Copies were sent to the six subscribers named in the indictment (A. 393a-401a; GX 7A, 7B). The article did not contain any disclosure of the bribe to Aiken.

On September 28, 1972, Aiken told Zammas by telephone that the published copy of the Power Conversion article was ready, and they agreed to meet that night at the Ground Floor Cafe in Manhattan (A. 222a). Prior to their arrival at the Ground Floor, Aiken told Susan Robbins, who subsequently became Mrs. Aiken, that they were meeting Zammas to give him copies of the article he had prepared that week and to get money from Zammas (A. 456a-57a).

After some small talk, Zammas asked Aiken to leave the table with him. They went to the men's room (A. 224a, 458a, 966a) where Zammas gave Aiken $14,000 in cash and offered him an additional bribe of $25,000 if Aiken were able to "park" * 25,000 shares of Power Conversion stock (A. 224a-25a). Before leaving the restaurant, Aiken handed Zammas an envelope containing six copies of the September 29, 1972 issue of *Selection & Opinion* (A. 225a, 458a-59a).

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* Aiken defined "park" as "getting a friendly portfolio manager or money manager to agree to buy the stock sometimes for a monetary consideration, sometimes with a guarantee against loss or other inducement . . . in effect, it is a means of getting stock off the market." (A. 224a-25a). "Parking" stock is a manipulative device in violation of Title 15, United States Code, Section 78j(b) and SEC Rule 10b-5.

After Aiken and Susan Robbins left the restaurant, Aiken showed her an envelope containing a "lot of bills," told her he had received $14,000 from Zammas, and gave her $2,000 (A. 225a, 459a). Later that night, Aiken loaned Dan Lettieri $2,000 in cash (A. 226a, 835a; GX 6A), and on the following day, Aiken deposited $9,500 in cash in his bank account (A. 226a; GX 1F).

On the morning of September 29, 1972, Zammas and Rodman met with Alan Umbogy, a private investor, at Wolf's Coffee Shop at 42 Broadway in Manhattan.* Rodman told Umbogy that Zammas had just finished arranging for the Value Line article about Power Conversion to be published, gave Umbogy a copy of the article (GX 10A), and attempted to persuade Umbogy to buy a substantial block of Power Conversion stock (A. 705a-07a). On that same day, Zammas telephoned Aiken and jokingly told Aiken that he had shown the article to Rodman and Rodman liked it so much he was thinking of buying the stock (A. 227a).

On September 29, 1972, the publication date of the article, Power Conversion stock was trading at approximately $39 per share. One week later the price had fallen to $5 per share and trading in the stock was suspended (A. 233a, 262a, 985a). In February of 1973, Zammas and Aiken were in Newport Beach, California, and were discussing the "untimely skid" of the price of Power Conversion stock (A. 234a-35a). Zammas told Aiken, "The SEC is after me, but you don't have to

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* Umbogy testified that he believed that the meeting took place on September 27, but also testified that the meeting took place on "the day the Value Line article hit the street" (A. 768), which was September 29 (GX 1E).

worry because I can't do anything, you know I can't do anything to you without bearing to myself" (A. 236a).

The Defense Case

Zammas called Edward J. Crooker, who, in 1972, was the controller of Arnold Bernhard & Co., the publishers of *Selection & Opinion* (A. 1005a). Crooker produced a list of the officers and directors of Arnold Bernhard & Co. as of September 1972 (A. 956, DX L), which did not include Aiken. Crooker also produced a copy of the October 16, 1970 issue *Selection & Opinion* (DX I), containing the company's rules regarding conflict of interest, the same rules that were in effect and published during September, 1972 (A. 1009a-10a). Crooker also testified that Arnold Bernhard & Co. was not a Government agency, had no law-making powers and had no right to violate the laws of the United States (A. 1010a-11a).

Crooker further testified that there was nothing in the company's publication of its conflict of interest rules which would alert the public that some employee might take a bribe (A. 1019a), and that the company represented itself to the public as a reliable investment advisory publisher giving independent, objective evaluations of securities to its subscribers (A. 1020a-21a).

Finally, Crooker testified that, if Aiken had disclosed to the company that he received a $15,000 bribe from men promoting Power Conversion stock in return for doing an article on the stock, the article would never have been published, or, if the article were already published when the company learned of the bribe, the company would have disclosed the fact of the bribe to its readers in a subsequent issue of the publication (A. 1023a-24a).

ARGUMENT

POINT I *

The evidence was more than sufficient to demonstrate that Zammas intended his bribe to Aiken to go undisclosed and that he caused the Power Conversion article to be published.

Zammas argues that the Government's proof at trial was insufficient in two material respects. First, Zammas contends that the evidence was insufficient to demonstrate that he intended nondisclosure to the subscribers of *Selection & Opinion* of the bribe paid to Aiken. Second, he asserts that the Government failed to prove that either he published, or caused the publication of, the Power Conversion article. These arguments are entirely without merit.

While it is true that the Government introduced no evidence that Zammas specifically instructed Aiken not to disclose the bribe, there was an abundance of circumstantial evidence from which the jury could reasonably conclude that Zammas had no desire whatsoever to have the bribe disclosed and indeed actively facilitated its nondisclosure.** The two meetings between Zammas and

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* In order to make our arguments in a more logical fashion we have addressed the points raised by Zammas in a different order than raised by him. The points correspond as follows:

Zammas' Brief	*Government's Brief*
Point I	Point III
Point II	Point II
Point III	Point I
Point IV	Point IV

** This evidence of course must be viewed in the light most favorable to the Government. See, *e.g., United States* v. *Castellana*, 349 F.2d 264, 267 (2d Cir. 1965), *cert. denied*, 383 U.S. 928 (1966).

Aiken were conducted in a clandestine manner. The first meeting, at which the agreement was reached, took place neither at Zammas' or Aiken's place of business, nor during normal business hours, but instead at a midtown restaurant over dinner. The $1,000 cash advance paid later that night was exchanged in Zammas' apartment under circumstances which clearly revealed a desire for secrecy. Henry Goldfarb, a broker whose firm was trading Power Conversion stock, was in the living room of Zammas' apartment when Zammas summoned Aiken to the kitchen to receive the $1,000. Zammas' actions disclosed that he did not even want a broker with whom he was working to see or know about the payoff. The exchange of the final cash payment of $14,000 was also conducted in a manner which showed that Zammas wanted no one other than Aiken to know about the bribe. This second meeting also took place at night in a midtown restaurant. The only persons at the table were Aiken, Zammas, Aiken's fiancee and Zammas' girlfriend. Despite the obvious familiarity of the parties at the table, Zammas requested Aiken to leave the table before the money could be passed.* The two men then entered the men's room where Zammas handed Aiken $14,000 in cash.

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* Zammas contends that Aiken and Zammas left the table to transfer the $14,000 only because they did not want to do business in front of the ladies at the table. This argument is typical of a number raised in Zammas' brief to the effect that certain inferences ought not to have been drawn by the jury in this case. We respectfully submit that these arguments are of a sort which could properly be advanced only to a jury in summation, not to an appellate court, and we note that, when these arguments were advanced below in summation, they were quite clearly rejected by the jury. Moreover, the contention that Zammas and Aiken were gallantly seeking to spare their ladies embarrassment is wholly unsupported by the testimony. The record clearly demonstrates that it was Zammas who asked Aiken to accompany him away from the table and that Zammas

[Footnote continued on following page]

Aside from the circumstances under which the bribes were paid, the very fact that the payments were made in cash could not help but be of significance to the jury. A legitimate, open, business transaction of $15,000 is generally made by check. A jury could certainly conclude the handling of these transactions in cash was intended to avoid the making of normal business records and was part of a concerted effort to conceal the payments. *Cf. Spies* v. *United States*, 317 U.S. 492, 499 (1943).*

Also of significance was that this was not the first such transaction between Zammas and Aiken. In the Fall of 1970, Zammas bribed Aiken to publish an article about the stock of Casa Bella Imports, Inc. That article was published without disclosing the bribe (GX 1-A), and surely the jury could infer this was the way Zammas preferred to do business.**

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made the $14,000 payment in the men's room (A. 224a). No testimony was elicited as to why this was done, but the inference that secrecy was desired by Zammas is obvious. Clearly Aiken had no desire to keep the payoff secret from his fiancee. He had already told her that they were meeting Zammas that night in order to collect the money for the article from Zammas (A. 456a-57a).

* Zammas argues that the use of cash does not support an inference of a desire for secrecy. He argues that it was Aiken who requested cash because Aiken feared Zammas' check would bounce. There was no testimony to the effect that Aiken ever asked for cash, much less that he feared that a check would be dishonored. Zammas offered cash, we submit, in the time honored tradition of making illegal payments in a way which would be very difficult, if not impossible, to trace.

** Zammas argues that there was no evidence that the earlier Casa Bella article failed to disclose the bribe promised for its publication. This ignores the plain statement in Aiken's agreement with the Government, which was admitted in evidence and read to the jury, that he had published the Casa Bella article without disclosing the promised bribe (GX 1A).

Finally, the jury could reasonably have concluded that the entire nature of Zammas' scheme *required nondisclosure*. If it had been revealed that the article had been obtained by the payment of a bribe, the article would have been rendered useless as a tool for persuading people to buy Power Conversion stock. Since the utility of the article depended on the public's perception of it as an objective piece of journalism, the jury could certainly conclude that Zammas did not intend the bribe to be disclosed.

Zammas' claim that the Government failed to prove that he caused the article to be published is even less persuasive. His argument is premised on the fact that Aiken did not own *Selection & Opinion* and did not have absolute autonomy over publication decisions. From this proposition Zammas argues that, since Aiken was not the publisher of the article, he, Zammas, could not be found to have caused the publication of the article by bribing Aiken. Zammas thus chooses to ignore the testimony of Aiken that he wrote the article and sent it to the printer and that, as executive editor, he had almost complete authority to determine what in fact would be published. While it is true that his employer retained the ultimate authority to decide what would be published, and occasionally exercised that authority, that hardly contradicts the obvious fact that Aiken not only could, but did, cause the Power Conversion article to be published. Title 15, United States Code, Sections 77q(b) and 77x prohibit "any person" from publishing, giving publicity to or circulating an article about a security without disclosing that a bribe has been paid for its publication, and Title 18, United States Code, Section 2 punishes anyone who "causes an act to be done which if directly performed by him or another would be an offense against the United States. . . ." There can be no doubt, we submit, that Zammas "caused" the publica-

tion of the Power Conversion article within the meaning of Section 2 in the sense that he participated in the venture and sought by his actions to make it succeed. *Nye & Nisson* v. *United States*, 336 U.S. 613 (1949); *United States* v. *DeJesus*, 289 F.2d 37, 40 (2d Cir.), *cert. denied*, 366 U.S. 963 (1961); *United States* v. *Peoni*, 100 F.2d 401, 402 (2d Cir. 1938). See also *United States* v. *Scandifia*, 390 F.2d 244, 248-50 (2d Cir. 1968).

POINT II

The Court properly instructed the jury on the issues of non-disclosure and publication, and, if it did not do so, any error was harmless.

Zammas contends that the court failed properly to instruct the jury on the essential elements of a violation of the anti-touting statute, Title 15, United States Code, Section 77q(b).* He raises three specific claims, none of which are meritorious.

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* The court's instructions with respect to the anti-touting statute were as follows:

> "It is necessary for you to find that the Government has proved beyond a reasonable doubt each of the following four elements of that crime: first, that a person by use of the mails has published or circulated an article describing a security.
>
> Second, that consideration for such publication or circulation has been received or promised from a dealer.
>
> Third, that there has been no disclosure of the payment, made or promised or the amount of such consideration.
>
> Fourth, that the article has been wilfully and knowingly circulated.
>
> Now, again with respect to Counts 7 through 12, they all charge a violation of that statute.
>
> I am going to discuss in a little greater detail each of those four elements. The first element, use of the mails to circulate an article, I have already instructed you that

[Footnote continued on following page]

in prosecutions for using the mails to defraud, it is not necessary for the Government to prove that any of the defendants actually placed the article in the mail. It is sufficient for the Government to prove that the defendant caused a mailing to be made in the course of business. It is enough that the defendant took steps which he knew at the time might naturally and probably result in the use of the mails.

The second element: Receipt or promise of consideration from a dealer. In order to find a defendant guilty of the second element or a crime, it is necessary that the Government prove beyond a reasonable doubt that a promise to pay consideration has been offered by a dealer, to have the article Power Conversion published.

In this case the Government contends that the defendants Rodman and Zammas promised a consideration to Eric Aiken for publishing the Power Conversion article. The Government contends that the consideration was $15,000 in cash, plus some Power Conversion options.

The Government contends that at the time the money was promised to Aiken, the defendants Rodman and Zammas were both dealers, within the contemplation of the statute.

In order to find the defendants guilty you must find beyond a reasonable doubt that they were dealers.

The law defines a dealer as any person who engages either for all or part of his time, directly or indirectly, as agent, broker or principal, in the business of offering, buying, selling or otherwise dealing or trading in securities issued by another.

I charge you as a matter of law that the common stock of Power Conversion, which was the subject of the article in question in this case is a security within the meaning of the statute which I just read to you.

The third element: Non-disclosure. If you find that money or other consideration has been promised or paid for an article which will be circulated by mail, then you must determine whether the promise or amount of consideration has been made public or disclosed. If you find that the money was transferred secretly, that will be sufficient to satisfy the third element.

The fourth element is that the defendants acted wilfully and knowingly.

I have already described or defined those terms for you in connection with the mail fraud statute" (A. 1239a-42a).

Zammas' first claim is that the court in effect directed a verdict on the issue of Zammas' intent to cause non-disclosure when instructing the jury that "[i]f you find that the money was transferred secretly that will be sufficient to satisfy the third element." The obvious premise of Zammas' argument is that, in this portion of the charge, the court was addressing itself to the issue of the defendants' intent. However, this plainly was not the case. The "third element" of the crime as defined by the court was "that there had been no disclosure of the payment made or promised or the amount of such consideration." This was an element which in no way depended on the defendant's state of mind, but rather focused upon the content of the article which was distributed to the subscribers.* The Court's further explanation of this element clearly shows that the court was concerned with the content of the article, not with Zammas' state of mind:

> "The third element: Non-disclosure. If you find that money or other consideration has been promised or paid for an article which will be circulated by mail, then you must determine whether the promise or amount of consideration has been made public or disclosed. If you find that the money was transferred secretly, that will be sufficient to satisfy the third element." *

The last sentence of this instruction—the one of which Zammas complains—was plainly meant to convey to the jury only the thought that, if the money had been transferred secretly and secrecy was thereafter maintained,

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* A violation of the statute requires that the article be circulated "without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof." 15 U.S.C. § 77q(b).

the jury would be required to find that the article contained no disclosure. And, in any event, since the article was in evidence and there was never any claim that the article contained the required disclosure of the bribe. Zammas can hardly be heard to claim any prejudice. In short, since the court was clearly not addressing itself to Zammas' intent when discussing this element, the claim that this disputed commit had the effect of directing a verdict on that issue is utterly frivolous.*

Zammas' second assignment of error with respect to the charge is equally unpersuasive. He argues that he was prejudiced by the court's failure to charge the jury that "a publisher is one who issues or causes to be issued printed matter for sale or circulation." The prejudice arises, he claims, because "[a]n integral portion of the defense was the legal position that Aiken was not a publisher . . . [and] could not possibly have caused the article to the published . . ." (App. Br. 27).

This claim is frivolous, since the court instructed the jury that they must find that the article was "wilfully and knowingly circulated." The addition of Zammas' requested instruction that "a publisher is one who issues or causes to be issued printed matter for sale or circulation" would have been redundant.

In any event, the claim of prejudice is totally unconvincing. There was no dispute that the article was, in fact, published and circulated, and the contention that Aiken could not possible have caused the article to be cir-

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* Zammas' contention also ignores the instruction immediately following the instruction on non-disclosure in which the court told the jury that they must find "that the defendants acted wilfully and knowingly" (A. 1242a). It is thus clear that the court did not remove the issue of wilfullness from the jury or direct a verdict of guilty on that issue.

culated is absurd. The *uncontradicted evidence* was that Aiken was the executive editor and had virtual autonomy over publishing decisions. He wrote the article and sent it to the printer at which point the ordinary course of business resulted in the printing of the article and its routine circulation to subscribers by mail. A clearer case of causing publication and circulation is hard to imagine.

Finally, Zammas claims that the court's charge was erroneous in that it did not require the jury to find that he *intended* that the bribe paid to Aiken would remain undisclosed to subscribers. While the court's instructions on this issue might have been more precise, the instructions read as a whole adequately informed the jury that, in order to convict Zammas on counts seven through twelve—the anti-touting counts—they had to find that he knowingly and wilfully caused the publication of the Power Conversion article without disclosure of the bribe.* In its charge relating to the anti-touting statute, the Court instructed the jury that they must find that Zammas acted "wilfully and knowingly" and incorporated by reference the explanation of those terms given during the portion of the charge relating to mail fraud (A. 1242a).**

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* It was, of course, unnecessary for the Government to prove that Zammas acted with a specific intent to violate the law. The Government need only prove that the defendant wilfully performed the acts which constitute the offense. See *United States* v. *Schwartz*, 464 F.2d 499, 509 (2d Cir. 1972); *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 855 (2d Cir. 1968).

** The charge relating to the mail fraud counts was as follows:

> "Now, in order to find a defendant on trial before you guilty of mail fraud statute, you must find the Government has established beyond a reasonable doubt each of the following elements:
>
> 1. That on or about the date alleged in the indictment, the defendants under consideration devised or intended to

[Footnote continued on following page]

devise a scheme or artifice to defraud or to obtain money by fraudulent pretenses or representation.

2. That the defendants did devise or become a party to such a scheme or artifice, knowingly and wilfully, with knowledge of its fraudulent nature, and with intent to defraud.

3. That for the purpose of executing the scheme or artifice that the defendant did use or caused another to use the mails.

4. As you gathered by my reading of the indictment, all of the first six counts charge a violation of the mail fraud statute in that each of the six firms or individuals listed in Counts 1 through 6 allegedly were mailed a copy of Value Line of September 29, 1972, as alleged in the indictment.

Now I am going to tell you in greater detail about each of these, something about each of these three elements which I have just read, which you must find that the Government has established before you can find a defendant guilty of any of these mail fraud charges.

The first element of the offense is the existence of a scheme or artifice to defraud. The language describing this first element is almost self-explanatory.

A scheme or artifice is merely a plan for accomplishing an objective. Fraud is a generic term which embraces all of the multifarious means which human ingenuity can devise and which are resorted to by one individual to gain an advantage over another by false misrepresentations, suggestions or by suppression of the truth. Thus, a scheme to defraud is merely a plan to obtain money or property or some advantage of value by trick or deceit.

With respect to the second element, that is, that you must find that the defendants devised or became a party to a scheme or artifice, knowingly and wilfully, with knowledge of its fraudulent nature and with intent to defraud, you must find, as I indicated, that the defendant acted knowingly and wilfully.

In other words, I want to emphasize this point, that in order to convict a defendant on any count, you must find beyond a reasonable doubt that he acted unlawfully, knowingly and wilfully.

Now, unlawfully obviously means contrary to law. An act is done knowingly if it is done voluntarily and purpose-

[Footnote continued on following page]

But even assuming *arguendo* that the instructions on intent were deficient with respect to the anti-touting counts, Zammas surely suffered no prejudice. For prior to reaching the section of the charge relating to the anti-touting statute, the court instructed the jury that, in order to convict on the mail fraud counts, they must find beyond a reasonable doubt that Zammas acted "with intent to defraud" and that he acted knowingly and wilfully with "a bad purpose or motive." No claim has been raised, nor could one properly be made, that the instructions on the mail fraud counts were in any way defective. The fraudulent scheme for which Zammas was charged and found guilty in these counts was that he would pay Aiken a bribe in return for Aiken writing and publishing an article recommending the purchase of Power Conversion stock "without disclosing in said article or elsewhere the material fact that the defendant . . . Aiken had received and accepted said bribe." (A. 1228a). It would, we submit, be all but impossible to believe that the jury might have found that Zammas acted knowingly and wilfully with respect to the mail fraud counts, but that he did not do so with respect to the anti-touting counts.

And finally since Zammas does not contend that the charge given with respect to the mail fraud counts was

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ly and not because of mistake, accident, mere negligence or other innocent reason.

An act is done wilfully if it is done knowingly, deliberately, intentionally and with an evil motive or purpose.

In determining whether a defendant has acted wilfully, it is necessary for the Government to establish the defendant knew that he was breaking any particular law or any particular rule. It must, however, prove a bad purpose or motive on the part of the defendant. Knowledge and wilfulness and intent of a defendant need not be proved by direct evidence, as I told you earlier, like any other fact in issue, it may be established by circumstantial evidence as I previously defined that term for you" (A. 1230a-32a) (emphasis supplied).

in any way erroneous, and since he received concurrent sentences on all twelve counts, the conviction should, in any event, be affirmed under the concurrent sentence doctrine. *Hirabayashi* v. *United States*, 320 U.S. 81 (1943); *United States* v. *Febre*, 425 F.2d 107, 113 (2d Cir. 1970); *United States* v. *Scandifia, supra*, 390 F.2d at 250.

POINT III

The comments by the Court during the summations were not only proper but necessary under the circumstances.

Zammas contends that he was deprived of a fair trial because of two allegedly improper comments by the trial judge, one of which occurred during defense counsel's summation and the other of which occurred during the Government's rebuttal summation. This contention is utterly without merit. Both comments complained of were entirely appropriate.

The first comment of which Zammas complains occurred when defense counsel argued to the jury that "my client is on trial for making a payment that he had a perfect right to make under the Federal law provided said payment was disclosed" (A. 1140a-41a). The Government objected, and the court responded:

> "Yes, we went over that earlier and it was determined that under State law if the jury finds it to be true, it is not a legal act. The question is whether or not you are implying to the jury that giving a payment under the circumstances here is legal.
>
> You said it was legal and we determined it was illegal under State law to give such a payment.

> The Federal law makes it illegal to give such a payment if it is not disclosed. Don't mislead the jury by telling them it is a legal act if they find it did occur" (A. 1141a).

The trial judge, in directing counsel's attention to earlier conversations concerning the legality of the payment, was referring to discussions which occurred during argument for judgments of acquittal at the close of the evidence. At that time, the Government rebutted defense counsel's contention that the payment to Aiken was a legal act, if disclosed, by pointing out that the payment to Aiken might well have violated the New York commercial bribery statute.* The court at that time instructed counsel that "it is incorrect to say to the jury something is legal which is made illegal by the state law, even though not made illegal by the federal statute" (A. 1060a).

Despite the trial court's explicit instruction, defense counsel chose to argue to the jury that his client was "on trial for making a payment *he had a perfect right to make under Federal law provided said payment was disclosed.*" Defense counsel's statements were most certainly misleading, whether intended or not, and the trial court had every right to make certain the jury was not left with an incorrect impression of the law. It would have been entirely proper, and indeed quite simple, to argue that, if the bribe had been disclosed, federal law would not have been violated. Defense counsel instead

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* New York Penal Law § 180.00 provides:

> "A person is guilty of commercial bribing when he confers, or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs."

chose to tread in an area he had specifically been warned not to and implied that, if disclosure were made, then Federal law conferred a "perfect right" on Zammas to pay the bribe. This was most certainly misleading and incorrect. The New York commercial bribery statute is violated when payment is made to an employee consent of his employer to influence the employee's conduct in relation to his employer's affairs. The fact that a bribe paid to an editor to write an article about a certain security might *later* be disclosed, inadvertently or otherwise, to the editor's employer and as a result to subscribers, might well prevent prosecution under 15 U.S.C. § 77j(b). But the fact that this transaction would not be prosecutable under federal law certainly would not confer on the employee or bribe-giver the right to engage in the bribery. Indeed, it seems quite clear that the plain words of the commercial bribery statute would be violated, even though the employer and the subscribers later learned of the bribe.

Incredibly, Zammas also argues that there was insufficient evidence in the record to establish a violation of the commercial bribery statute (App. Br. at 17, n. 1). Aside from the fact that Judge Motley never said there was sufficient evidence, but merely said the jury might be able to find that there was, Zammas overlooks the very evidence that led to his conviction. Money was clearly paid to Aiken by Zammas to induce Aiken to write the Power Conversion Article, and all of the surrounding circumstances of the payment point to the conclusion that Aiken's employer, Arnold Bernhard & Co., did not know of, and had not consented to, the payment. Moreover, Zammas' own witness testified that, if Arnold Bernhard & Co. had known of the payment, the article would never have been published (A. 1023a-24a).

Since the court's conclusion that the payment by Zammas may have violated State law was warranted

by the record, and the court's comment to the jury to that effect was an appropriate reply to the misleading statement by defense counsel implying that federal law might somehow confer a right on Zammas to give the bribe, there was plainly no error in the court's comment.

Zammas' second complaint focuses upon a comment made by the court to the effect that the jury could conclude that the prior relationship between Aiken and Zammas, involving a bribe for an article about Casa Bella Imports, Inc., was also illegal (A. 1171a). This comment came in response to defense counsel's object to a remark by the prosecutor during rebuttal summation. The exchange was as follows:

> "The Court: I told the Jury it is their recollection of the facts which control. The motion to strike is unnecessary. If they remember it differently, they remember it differently. I don't remember precisely what Mr. Aiken said, but it is the Jury's recollection that controls' and they might even infer that from all of his other testimony or the testimony relating to this, if they so desire, that was also an illegal proposition.
>
> There is evidence from which they could, if they believed the testimony of Aiken, infer that was so in that case, so it is unnecessary to strike it. Proceed" (A. 1171a-72a).

Zammas premises his argument concerning the impropriety of this remark on the mistaken belief that there is nothing in the record which establishes that the payment for the Casa Bella article went undisclosed. Overlooked is the fact that Aiken's agreement with the Government, which was admitted into evidence (GX 1A), contains a statement that the Casa Bella payment was not disclosed.

Zammas' secondary claim that the effect of the court's comment about the Casa Bella payment was to inform the jury that the court believed that Zammas was guilty of at least something, and therefore should be convicted, is frivolous. The court did not say that it believed Zammas had committed an illegal act. The court merely said that, if the jury believed Aiken, they could find that the prior activities were also illegal. In addition, in its charge, the court specifically told the jury that Zammas was not on trial for the Casa Bella payoff and that the evidence concerning that transaction could be considered "only with respect to the question of whether Mr. Zammas acted knowingly and wilfully and intentionally." (A. 1233a).

With respect to both of the comments cited by Zammas as reversible error, the court did nothing more than perform its proper function of advising the jury of the legal conclusions which the record might support. No attempt was made to usurp the role of the jury. It is only in cases in which the court makes "deductions and theories *not warranted by evidence*", *Quercia* v. *United States*, 289 U.S. 466, 470 (1933) (emphasis supplied), expresses its own opinion of the guilt of the defendant, *United States* v. *Woods*, 252 F.2d 344 (2d Cir. 1958), or unduly injects itself into the trial accused is guilty, *United States* v. *Nazzaro*, 472 F.2d 302 (2d Cir. 1973), that a conviction should be reversed. Here the court did not express any opinion as to the actual facts, the credibility of any of the witnesses or Zammas' guilt.*

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* The court charged the jury as follows:

"with respect to any matter of fact, as I have told you previously, it is your recollection and your recollection alone which governs. Anything a lawyer may have said in the case which does not accord with your recollection of the facts is not to be substituted in lieu of your own recollection of what the evidence shows" (A. 1208a).

* * * * *

[Footnote continued on following page]

The court merely instructed the jury that, if they found certain facts to be established, those facts would constitute a violation of the law.

POINT IV

Appellant has withdrawn his claim that the Government suppressed favorable evidence.

The United States Attorney has been advised by counsel for Zammas that, because he was aware, during the trial, of the evidence to be obtained from Darnice Gennaro and made a conscious decision not to call her as a witness, even though she was available to be called, he has withdrawn the claim that the Government suppressed favorable evidence.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

THOMAS J. CAHILL,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

JOHN A. LOWE,
LAWRENCE B. PEDOWITZ,
Assistant United States Attorneys,
Of Counsel.

"The fact that I have denied motions or granted motions in the course of the trial is not to be taken by you as an indication that the court believes the defendants to be guilty or not guilty, and as I believe I told you initially, these rulings had to do with questions of law and not with questions of fact" (A. 1209a).

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Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss.:

JOHN A. LOWE, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 29th day of December, 1975 he served a copy of the within Brief by placing the same in a properly postpaid franked envelope addressed:

Franklin, Ullman, Kimler, Entin & Katz
2020 North East 163rd St.
Suite 300
North Miami Beach, Fla. 33162

and

Wynn & Atlas
230 Park Avenue
New York, NY 10017

And deponent further says that he sealed the said envelope and placed the same in the mailbox drop for mailing at the United States Courthouse Annex, One St. Andrew's Plaza, Borough of Manhattan, City of New York.

John A. Lowe

Sworn to before me this
29th day of December 1975

Mary L. Avent

MARY L. AVENT
Notary Public, State of New York
No. 03-4500237
Qualified in Bronx County
Cert. filed in Bronx County
Commission Expires March 30, 1977